Supreme Court, U. S.
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No. 75-1746

In the Supreme Court of the United States

OCTOBER TERM, 1976

LAYMON WESLEY ALSBURY, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner was discharged from his employment with the Postal Service. He contends that his discharge hearing did not satisfy due process requirements and that his acquittal on criminal charges precludes the Postal Service from discharging him.

1. In June 1972 petitioner was appointed Assistant Postmaster in Mojave, California. Because the Postmaster became ill, petitioner served as Officer-in-Charge until July 2, 1973, when a regular Postmaster was appointed. Petitioner's request for transfer to the Santa Barbara Post Office was granted effective July 21, 1973; he reported for duty in Santa Barbara on August 14, 1973 (Pet. App. A-25 to A-26).

In August 1973 it was discovered that petitioner had removed an air conditioner, a tape cassette recorder and a wooden bookcase from his Mojave office shortly before

his transfer. Disciplinary action was instituted. On September 20, 1973, petitioner received a notice of proposed suspension, to which he had an opportunity to respond (Pet. App. A-1 to A-2). On September 22, 1973, he was advised that he would be suspended indefinitely (*id.* at A-3 to A-4), and a notice of proposed removal was furnished to him on October 12, 1973 (*id.* at A-5 to A-7). Petitioner filed a written response. On October 30 he was notified that he would be removed as of November 16, 1973 (*id.* at A-8 to A-9).

Petitioner appealed both the suspension and the removal; the two appeals were consolidated for an adversarial hearing in January 1974, two weeks after petitioner had been acquitted of criminal charges arising from the appropriation of government property. The hearing examiner recommended affirming the suspension and removal (Pet. App. A-10 to A-18). After a "careful review * * * of the entire case file" (*id.* at A-19) the Regional Postmaster General found the charges to be "supported by a preponderance of record and are sustained" (*id.* at A-20).

Petitioner took a further administrative appeal. The Assistant Postmaster General affirmed, finding after a review of the complete appellate file that the charges "are supported fully and are sustained" (Pet. App. A-23). Petitioner then filed suit in the district court. Both the district court (392 F. Supp. 71; Pet. App. A-25 to A-39) and the court of appeals (Pet. App. A-40 to A-49) upheld his suspension and discharge.

2. Petitioner's claim that the administrative process did not afford him due process of law is incorrect. As the court of appeals observed (Pet. App. A-47 to A-49), the Postal Service regulations are similar to those upheld in *Arnett* v. *Kennedy*, 416 U.S. 134. Petitioner was given notice of his proposed suspension and discharge; he had an opportunity to respond and to review the material

relied on to support the disciplinary action. He had a full adversarial hearing. The administrative determination was based on a finding that the charges were supported by a "preponderance" of the evidence (Pet. App. A-20):

Petitioner suggests that a "preponderance" of the evidence is not different from a decision based on "substantial" evidence (Pet. 24), and that a decision supported only by "substantial" evidence would be defective. But proof by a prépondérance of the evidence entails more than proof by substantial evidence. *Virgin Islands Labor Union* v. *Caribe Construction Co.*, 343 F. 2d 364 (C.A. 3); *Sherman* v. *Lawless*, 298 F. 2d 899 (C.A. 8). In any event, whatever words are used to characterize the evidentiary burden, the Constitution does not draw so fine a line. Petitioner received his due—an opportunity to put his version of the facts before the administrative tribunal.[1] *Mathews* v. *Eldridge*, No. 74-204, decided February 24, 1976.

3. Nor was the Postal Service bound by petitioner's acquittal on the criminal charge of misappropriating the property in question. Petitioner's argument is foreclosed by *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232.

Coffey v. *United States*, 116 U.S. 436, upon which petitioner relies (Pet. 27), is not to the contrary. *Coffey* was a civil action, brought after acquittal on criminal charges, and involving the same "act, attempts and intent" as the criminal action (116 U.S. at 442). *Stone* v. *United States*, 167 U.S. 178, made it clear that *Coffey* does not deal with

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[1]Petitioner's argument that the officer who brought the charges against him was biased is unsupported; the record shows only that the officer was affected by the natural weight of the evidence against petitioner. Cf. *Arnett* v. *Kennedy*, *supra*; *Hortonville Joint School District No. 1* v. *Hortonville Education Association*, No. 74-1606, decided June 17, 1976.

a civil case in which the actor's intent is different from the intent necessary to support a verdict of guilt in the criminal case. See also *One Lot Emerald Cut Stones, supra,* 409 U.S. at 235 n. 5. In the present case the hearing examiner specifically stated that "misappropriation," the civil charge, is something less than "theft," the criminal charge (Pet. App. A-17), and that the criminal intent necessary for theft is not an element of proof in the discharge proceedings (*id.* at A-14). All recent decisions are in accord. *Polcover* v. *Secretary of the Treasury,* 477 F. 2d 1223, 1231-1232 (C.A. D.C.); *Finfer* v. *Caplin,* 344 F. 2d 38, 41 (C.A. 2), certiorari denied, 382 U.S. 883; *Taffel* v. *Hampton,* 463 F. 2d 251 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.